90-1166

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LONG ISLAND TYPOGRAPHICAL UNION
No. 915, CWA, AFL-CIO,

Petitioner,

v.

NEWSDAY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court may refuse to enforce an arbitration award on public policy grounds only when the award itself violated a statute, regulation or other manifestation of positive law, or compels conduct by the employer that would violate such a law?

2. Whether a reviewing court may substitute its judgment for that of an arbitrator in order to increase a penalty meted out to an employee so as to ostensibly provide greater vindication of a public policy?

3. Whether the public policy against sexual harassment in the workplace is so overriding so that reviewing courts may carve an exception to the traditional policy against vacating arbitration awards?

LIST OF ALL PARTIES

1. NEWSDAY, INC. — Plaintiff-Appellee

2. LONG ISLAND TYPOGRAPHICAL UNION, No. 915, CWA, AFL-CIO* — Defendant-Appellant

3. NOW LEGAL DEFENSE AND EDUCATION FUND *ET AL* — *Amici Curiae*

4. *UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION* — *Amicus Curiae*

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* *There are no parent companies or non wholly owned subsidiaries that need to be disclosed.*

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No.

IN THE

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PETITION FOR CERTIORARI

OPINIONS BELOW

To petitioner's knowledge, previous opinions rendered in this case have not been reported.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Second Circuit, sought to be reviewed, was entered on October 5, 1990.

2. No rehearing was requested.

3. This Court has jursidiction to review the judgment or decree in question by writ of certiorari pursuant to 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

The relevant statue is 9 U.S.C. Section 10. This statute provides:

> "In either of the following cases United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

STATEMENT OF THE CASE

This is an action commenced by respondent Newsday, Inc. on or about September 29, 1989. In this action, respondent sought an order vacating that part of the arbitration award which ordered that the grievant, William Waters, be reinstated to his former position without back pay. Subsequent thereto, petitioner Long Island Typographical Union No. 915 counterclaimed for an order (1) to confirm that part of the award which held that respondent discharged grievant without just cause and which ordered respondent to reinstate him; (2) to vacate that portion of the award which gave respondent the right to have grievant examined to determine whether he is medically fit to perform all the duties of his job; and (3) to make grievant whole for all losses that he suffered from the date that respondent failed to comply with the award, including all appropriate back pay and other benefits that grievant would have received but for respondent's failure to reinstate him, together with appropriate interest thereon.

Soon thereafter, respondent moved for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Respondent sought an order "Vacating, setting aside and declaring null and void the award of Arbitrator Adelman dated August 25, 1989, on the grounds that the award violates the public policy against sexual harassment, impermissibly amends and ignores provisions of the collective bargaining agreement which he was required to interpret, and ignores a precedential and binding prior arbitration award, thus exceeding his authority under the collective bargaining agreement."

Petitioner cross-moved for summary judgment pursuant to Rule 56. Petitioner sought an order confirming that part of the arbitrator's award which held that respondent discharged the grievant without just cause and which further ordered respondent to reinstate him. The cross-motion sought a further order for summary judgment pursuant

to Rule 56 vacating that portion of the arbitrator's award which gave respondent the right to have grievant examined to determine whether he is medically fit to perform all the duties of his job. In addition, petitioner sought an Order making grievant whole for all losses that he suffered from the date that respondent failed to comply with the award including all appropriate back pay and other benefits that grievant would have received but for respondent's failure to reinstate him, together with appropriate interest thereon.

In a Memorandum and Order dated February 6, 1990, the Honorable I. Leo Glasser granted respondent's motion for summary judgment and denied petitioner's cross-motion for summary judgment. In doing so, the District Court held that "The Court is driven to conclude that the arbitrator's award offends an explicit public policy that is clearly defined and readily found in statues, regulations and judicial decisions." The District Court held that the public policy offended by the award "is aimed at condemning sexual harassment in the work place."

The District Court continued:

> A clearer expression of a well defined public policy than is reflected in the foregoing statutes and judicial precedent will not be more readily found. That policy is subverted when an employer is required to reinstate an employee who is a chronic sexual harasser and an award which has that effect should be vacated.

The District Court in the Memorandum and Order did not reach the other arguments advanced by respondent in support of its motion. Pursuant to the District Court's directive, the Clerk of the Court entered judgment in favor of respondent on April 11, 1989.

Petitioner, believing that the District Court erred in granting summary judgment to respondent, while denying it's cross-motion, duly appealed to the United States Courts of Appeals for the Second Circuit.

In a decision dated October 5, 1990, the Court of Appeals affirmed the District Court's Order. This decision was filled in the Office of the Clerk of the Second Circuit on October 5, 1990.

Petitioner now files the Petition for a Writ of Certiorari.

The basis for federal jurisdiction in the Court of first instance was under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, the U.S. Arbitration Act, 9 U.S.C. Section 10, 28 U.S.C. Section 1331; and 28 U.S.C. Section 1337.

ARGUMENT

The following discussion will reveal that this Petition should be granted because this action involves an important question of federal law which has not been, but should be, settled by this Court. Petitioner also respectfully submits that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings; or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

1. In *United Paperworkers v. Misco*, 484 U.S. 29 (1987), the Court specifically declined to decide the question whether "a court may refuse to enforce an award on public policy grounds only when the award itself violated a statute, regulation or other manifestation of postive law, or compels conduct by the employer that would violate such a law." *Id.* at 45 n. 12. Circuit Courts of Appeal since *Misco* have also declined to reach this question. *See Delta Air Lines v. Air Line Pilots Ass'n Int'l*, 861 F. 2d 665 (11th Cir. 1988); *Iowa Elec. Light & Power v. IBEW Local Union 204*, 834 F 2d 1424 (8th Cir. 1987); *but see Stead Motors v. Automotive Machinists Lodge 1173*, 886 F 2d 1200 (9th Cir. 1989).

The within action presents an opportunity for the Court to now address the issue since the issue was advanced by petitioner in the lower courts and apparently rejected by them. The issue is therefore ripe for review.

Review would also resolve conflicts between the Circuits on this issue. Prior to *Misco*, circuit courts did consider the issue. The Third Circuit held that public policy may be a ground for overturning awards "only if upholding an award would amount to 'judicial condonation' of illegal acts" and thus would "conflict directly with federal or state law." *Super Tire Engineering Company v. Teamsters Local 676*, 721 F. 2d 121, 125 n. 5 (3rd Cir. 1983) *citing Kane Gas Light and Heating Company v. Int'l Brotherhood of Firemen and Oilers Local 112*, 687 F. 2d 673, 681-682 (3rd Cir. 1982).

The District of Columbia Circuit in *Northwest Airlines v. Air Line Pilots Association*, 808 F. 2d 76, 83 (D.C. Cir. 1982) similarly ruled. There, the D.C. Circuit enforced an award reinstating an airline pilot who had been drinking alcoholic beverages immediately prior to a scheduled flight. The D.C. Circuit concluded that reinstatement was not against any public policy because the award itself did not violate established law or seek to compel some unlawful action.

In the case at bar, petitioner also argued that, in applying the public policy ground to an arbitration award, the court should apply the analysis which the Court in *Misco* specifically refused to reach, but which circuit courts did reach prior to *Misco*. The Second Circuit apparently refused to reach it as well. Specifically, petitioner had argued that enforcement of the award would not itself violate established law or compel an unlawful act.

Petitioner respectfully submits that this action presents an opportunity for the Court to now consider an issue which it has previously specifically refused to consider: Whether "a court may refuse to enforce an award on public policy grounds only when the award itself violated a statue, regulation or other manifestation of positive law, or compels conduct by the employer that would violate such a

law. *United Paperworkers v. Misco*, 484 U.S. at 45 n. 12. Review would also resolve a conflict between the circuit courts.

2. Petitioner also respectfully submits that the lower courts should not have substituted their judgment for that of the arbitrator in order to increase a penalty meted out to the grievant so as to purportedly provide greater vindication of a public policy interest. In doing so, the Second Circuit departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the District Court, as to call for the exercise of this Court's power of supervision.

Petitioner respectfully submits that merely because the grievant was not discharged, does not mean that the award itself was against public policy. Certainly, the arbitrator by effectively suspending the grievant without pay for in excess of one year, and by giving him a stern warning for the future, cannot be said to have condoned his behavior or to have violated the public policy against sexual harassment in the workplace. Respondent did not point to any authority which compels discharge under the facts of the within matter. As such, there was simply no need for the lower courts to substitute their judgment for that of the arbitrator in order to purportedly provide for a greater vindication of the public policy. The public policy interest has already been vindicated. Public policy did not mandate anything more. It certainly did not mandate the grievant's dismissal.

Under these circumstances, by increasing the penalty, the lower courts have effectively mandated that employees who stand accused of violating the public policy against sexual harassment in the workplace will have a more onerous burden in avoiding discharge than will those who stand accused of other infractions. Petitioner respectfully submits that the establishment of an across-the-board rule that grievant who stand accused of sexual harassment in the workplace must be dismissed would establish a dangerous precedent and must be clarified by this Court.

A review of a panoply of case law indicates that the federal courts have been extremely reluctant to increase a penalty to provide for a

greater vindication of a public policy. The lower courts by doing so herein, so departed from the usual course of judicial proceedings so as to warrant the exercise of this Court's supervision.

In order to fully explore these issues, it is illustrative to look to prior cases for guidance. In *Premium Building Products Company v. United Steelworkers of America*, 616 F. Supp. 512, 516 (N.D. Ohio 1985), the court confronted a similar claim. Plaintiff therein argued that the public policy was violated by the employee's reinstatement. The court rejected this assertion and defended the arbitrator's award:

> "In his view this conduct warranted serious discipline but was not just cause for discharge. This court cannot establish an across-the-board ruling that public policy requires that anyone caught smoking marijuana at their workplace is subject to discharge in all cases. This is not to minimize the seriousness of this offense which, this court would think, should be the subject of clear work rules dictating company policy."

The court in *Local 722 v. Children's Hospital*, 117 LRRM 2486 (D.D.C. 1984), considered the similar question and rendered a similiar decision. The facts in this case were somewhat akin to those herein. The employer sought to vacate an award which ruled that a discharge was not for just cause and which modified it to a thirty (30) day suspension. The employee, who is the subject of the award, had allegedly assaulted a patient in the hospital within which the employee worked. The employer asserted that such an award violated local public policy proscribing assault and battery and a hospital's duty to protect its patients. The court rejected this argument. It held that the local public policy against assault and battery and a hospital's legal obligation to protect its patients "does not mandate discharge as distinguished from some other penalty, and that overall, the national policy favoring resolution of labor disputes by arbitration requires confirmation of this award." *Id.* at 2487.

A similar result was reached in *Kane Gas Light and Heating v. Local 112*, 687 F. 2d 673 (3rd Cir. 1982). There the 3rd Circuit

refused to vacate an award reinstating an employee despite a public policy argument. The employer argued that reinstatement violated public policy where the gas company employee had turned off the company's main valve during a period of severe weather.

The court rejected this argument and held:

> "Here, however, it cannot be argued that enforcement of the arbitrator's award, which while reinstating Pritchard did provide for a penalty, would amount to 'judicial condonation' of illegal acts. The award does not let Pritchard's actions go unpunished; rather, it subjects Pritchard to a thirty day disciplinary suspension. The Company has not brought to our attention any federal or state law that would compel the harsher sanction of discharge no doubt because no such law exists. Thus, we conclude that the award here cannot be vacated on the ground that it is inconsistent with public policy."

A similar result was also reached in *Amalgamated Transit Union v. Aztec Bus Lines*, 654 F.2d 642, 644 (9th Cir. 1981). In this case, the court also refused to vacate an award reinstating an employee where a public policy argument was presented. There a bus driver was involved in a number of accidents and mishaps during his first year of employment. He was accused of improperly continuing to operate a bus. The employer, in seeking vacatur, argued that reinstatement was against public policy which frowned upon employing bus drivers who had previously shown bad judgment.

The court rejected the public policy argument. It noted that the arbitrator did not approve of the employee's conduct. The Court continued that the arbitrator "merely concluded that, under the circumstances, a two week suspension without pay rather than outright dismissal was an adequate sanction. Even if we agreed with the employer that a more severe sanction was appropriate, we are not permitted to review the merits of an arbitral award. Public policy should not be turned into a 'facile method of substituting judicial for

arbitral judgment'." Thus, the court refused to vacte the award of reinstatement.

A similar result was reached in *Int'l Association of Machinists v. Campbell's Soup Company*, 406 F.2d 1223, 1227 (7th Cir. 1969). There the court was called upon to review the propriety of an award which reinstated an employee who had been found to be engaging in gambling activities on the employer's premises. The court rejected the employer's public policy argument. In doing so, the court held "while we....cannot condone employee gambling activities on the employer's premises, we have been referred by Campbell to no federal policy that required the arbitrator, in exercising his lawful contract power, to approve the discharge of (the employee) or to compel the imposition of harsher sanctions than the award provided udner all the circumstances."

The Second Circuit is totally in accord with this line of cases. For example, the court in *Local 453 v. Otis Elevator Company*, 314 F.2d 25, 28 (2nd Cir. 1963), rejected an employer's public policy argument. In this case, the employer also argued that the public policy of the State of New York mandated that an employee who had been convicted of violating State gambling statutes could not be reinstated. However, Judge Marshall held:

> "Of course there is a public policy which condemns gambling by an employee on the premises of his employer; it is a policy expressed by the section of the New York Penal Law which Calise was convicted of violating. But that policy has been vindicated in the present case in the very manner that the State of New York contemplated, by a criminal conviction and the judicial imposition of a penalty. Parenthetically, it may further have been vindicated, beyond any demands of the State of New York, by the seven-month layoff without compensation or accrual of seniority benefits which Calise sustained and which the arbitrator upheld. *There is no federal policy that requires greater vindication of the public condemnation of gambling than this.*

> *The law is not that Draconian. To enforce the arbitrator's award in these circumstances cannot fairly be looked upon as judicial condonation."* (Emphasis added).

Thus, the court refused to vacate the arbitration award which reinstated the employee despite the employer's public policy argument.

In summary, the public policy analysis cannot end with a determination of whether hostile environment sex discrimination violates public policy. Additional questions must be asked. These questions are whether the grievant's specific conduct violated an expressed public policy; whether the award itself violates public policy. All of these questions must be answered in the negative.

By ruling otherwise, the lower courts so deported from accepted judicial standards that this Court's intervention is required.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this court grant this petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEWSDAY, INC.,

Plaintiff,

v.

LONG ISLAND TYPOGRAPHICAL UNION NO. 915, CWA, AFL-CIO,

Defendant

CV-89-3228
MEMORANDUM AND ORDER

GLASSER, United States District Judge:

Plaintiff, pursuant to Rule 56, Fed. R. Civ. P., has moved this court for an order vacating and declaring null and void an arbitration award made by Richard Adelman, dated August 25, 1989, for the reasons that the award violates public policy against sexual harassment; is antagonistic to the terms of a collective bargaining agreement between the parties; ignores a prior arbitration award between the same parties concerning the same issue and exceeds his authority under the collective bargaining agreement.

The defendant cross-moved pursuant to the same Rule seeking an order confirming the award insofar as it determines that William Waters was discharged by the plaintiff without just cause and directs that he be reinstated; vacating that award insofar as it entitles the

plaintiff to have Waters examined to determine his medical fitness to perform the duties of his job, and for an order directing the plaintiff to reimburse Waters for the loss he sustained between the date of discharge and the date of reinstatement by way of back pay plus interest.

The statements of the parties submitted pursuant to Civil Rule 3(g) of this court, together with the attachments to their respective motions, readily permit the statement of the following uncontested issues of fact.

(1) William Waters was employed by Newsday from January 1968 until July 22, 1988 as a compositor in Newsday's composing room.

(2) On June 21, 1983, Waters was discharged for "disorderly conduct" in violation of Composing Room Office Rules. That conduct was offensive and unauthorized physical contact with female employees working in the composing room.

(3) On June 25, 1983 Waters was voluntarily reinstated. This discharge and reinstatement was grieved and arbitrated in November 1983 before George F. Sabatella who issued an award on February 23, 1984 sustaining the disciplinary action.

That award stated in part:

> Furthermore, I am also of the opinion the type and degree of misconduct which was the basis of Mr. Waters' disciplinary action can not in any way be tolerated in the work place for it disrupts and demoralizes the people functioning of a unit. Any action on the part of Mr. Waters which is consistent with this past citable behavior shall be grounds for immediate discharge and he will not be given the benefit of the doubt or shown any leinency (sic).

(4) Mr. Waters was discharged again on July 22, 1988 for violating composing room rules in making unauthorized physical contact with different female editors working in the composing room.

(5) The defendant union grieved this discharge which was arbitrated before Richard Adelman at hearings on March 22, May 4 and May 25, 1989. The arbitrator's award, dated August 25, 1989, stated in part as follows (p. 7):

> It must be noted that the Union's contentions that the incidents involving Mr. Waters were minor in nature, and that Newsday used the incidents as a pretext for discharging an employee with a job guarantee, are rejected. As indicated above, the incidents were serious, and the type which Newsday has attempted, and properly so, to eliminate from its workplace. Moreover, the arbitrator's award in the earlier case referred to above stated "as this award pertains to Mr. Waters' conduct at the work place, any behavior consistent with the grounds of the grievance shall be the basis of his immediate discharge." Thus, Newsday's decision to terminate Mr. Waters surely was not pretextual, nor was it the result of an overreaction to the clear facts uncovered by Newsday's investigation.

The award continued as follows, on page 8 thereof:

> As noted above, the penalty issue is very difficult. The fact that Mr. Waters has engaged in similar conduct in the past for which he was disciplined is significant, especially considering the serious nature of his conduct. However, these offenses are not ones that call for immediate discharge; instead, such offenses call for the application of progressive discipline. In fact, progressive discipline was applied to Mr. Waters in 1983 based on his long record with Newsday, which now approaches some twenty years. Had Mr. Waters been

disciplined after the incidents either with Ms. May or with Ms. Beine, discharge might have been appropriate following the incidents with Ms. Coleman. Although upper management of Newsday cannot be blamed for the failure to impose any discipline on Mr. Waters as they were unaware of those earlier incidents, it would be inappropriate, and contrary to the concept of progressive discipline, to uphold the discharge of Mr. Waters. At this point, Mr. Waters must understand that he has engaged in conduct that is unacceptable in the workplace, that he is treading on dangerously thin ice, and that any similar offensive behavior shall be grounds for his immediate discharge.

Therefore, based on the facts and circumstances of this case, and for the reasons explained, the Arbitrator issues the following:

AWARD

The discharge of William Waters was not for just cause. Mr. Waters shall be reinstated without any back pay, but since he has not worked at Newsday for over a year, Newsday shall have the right to have Mr. Waters examined to determine whether he is medically fit to perform all the duties of his job. The period from the date of his discharge until the date of reinstatement shall be considered a suspension. It is so ordered.

The plaintiff filed a complaint with this court on September 27, 1988 seeking to vacate this award on the grounds that it was (1) irrational, (2) contrary to the collective bargaining agreement and a prior binding final arbitration and thus exceeded the arbitrator's authority, and (3) contrary to public policy. This motion for summary judgment followed.

For the reason which follow, the plaintiff's motion for summary judgment is granted and the defendant's cross-motion is denied.

The court is mindful of its limited function when the parties to a collective bargaining agreement have agreed to submit a disputed issue to an arbitrator. It is mindful that it may not reconsider the merits of an arbitrator's award even if it disagrees with the arbitrator's judgment. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

The court is also mindful, however, that it may refuse to enforce an arbitrator's award under a collective bargaining agreement because it is contrary to public policy. That is only to make specific application of the deeply rooted common law doctrine that contracts that violate law or public policy will not be enforced. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983). General considerations of a public interest that is only vaguely defined or reflects the court's unarticulated view of what that public policy is, will not suffice. The public policy that is offended must be "some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents." *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

Upon the undisputed facts as previously stated, the court is driven to conclude that the arbitrator's award offends an explicit public policy that is clearly defined and readily found in statutes, regulations and judicial decisions.

The public policy offended by the award is aimed at condemning sexual harassment in the workplace and is reflected in Title VII of the Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2(a)(1) which makes it unlawful to discriminate against any person with respect to conditions of employment because of that person's sex. That general prohibition is elaborated in 29 CFR § 1604.11 as follows:

> (a) Harassment on the basis of sex is a violation of sec. 703 of Title VII. Unwelcome sexual advances,

> requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a....condition of an individual's employment,....or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

The inevitable consequence of the arbitrator's award which requires Newsday to reinstate Mr. Waters is to compel his female co-workers to submit to his sexual harassment (conduct of which he has been repeatedly adjudicated) as a condition of their employment and to permit his sexual harassment to threaten to perpetuate a hostile, intimidating and offensive work environment.

The depths to which these roots of public policy were intended to be planted is sternly expressed in 29 CFR § 1604.11(c), (d) and (f) as follows:

> (c) Applying general Title VII principles, an employer....is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.
>
> (d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

Thus, subdivision (c) creates a species of strict liability upon an employer for the acts of sexual harassment by his supervisory personnel and subdivision (d) makes him responsible for such conduct by his employees unless he took immediate corrective action. Subdivision (f) directs an employer to "take all steps necessary to prevent sexual harassment from occurring, such as....expressing strong disapproval, developing appropriate sanctions...." The employer has attempted to comply with that direction. Indeed, in discharging Mr. Waters in 1988 it obeyed the direction of a prior arbitrator who, sensitive to the seriousness of sexual harassment in the workplace, stated that such continued misconduct "shall be grounds for immediate discharge and he will not be given the benefit of the doubt or shown any leinency (sic)." Sabatella Award, at p. 12.

The federal policy against sexual harassment in the workplace is mirrored in the statutes and regulations of the State of New York. *See* N.Y. Exec. Law § 291; New York State Division of Human Rights, Rulings, 8B State Fair Empl. Prac. Laws (BNA 455:3159 (1989).

The need to demonstrate judicial cognizance of the public policy against sexual harassment should not require citation beyond *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986) which leaves no doubt that sexual harassment creates a hostile and offensive workplace environment which Title VII was designed to eliminate. To paraphrase the court's observation in *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) to require a woman to run a gauntlet of sexual abuse as a condition of working is demeaning and disconcerting.

A clearer expression of a well defined public policy than is reflected in the foregoing statutes and judicial precedent will not be more readily found. That policy is subverted when an employer is required to reinstate an employee who is a chronic sexual harasser and an award which has that effect should be vacated.

This motion for summary judgment is the appropriate procedural device for obtaining this result. Rule 56 of the Federal Rules of Civil Procedure must be applied with due regard for the right of a litigant to

demonstate, in accordance with the Rule prior to trial, that the defenses to his claim have no merit. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). There being no genuine dispute as to any material issue of fact and the plaintiff having demonstrated the merit of its claim and that the defense to it has no merit, its motion for summary judgment vacating the arbitrator's award is hereby granted. This determination makes moot the defendant's cross-motion which is, in any event, hereby denied.

SO ORDERED.

United States District Judge

Dated: Brooklyn, New York
February 6th, 1990

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1410 August Term, 1989
Argued: May 30, 1990 Decided: October 5, 1990

Docket No. 90-7236

NEWSDAY, INC.,

Plaintiff-Appellee,

- against -

LONG ISLAND TYPOGRAPHICAL UNION, NO. 915, CWA, AFL-CIO,

Defendant-Appellant.

Before: LUMBARD, KEARSE, and MINER, *Circuit Judges.*

Appeal from order of the District Court for the Eastern District of New York, Glasser, *J.*, granting summary judgment motion in appellee's action to vacate a labor arbitration award.

Affirmed.

BRADFORD W. COUPE, New York, N.Y. (Morgan, Lewis & Bockius, New York, N.Y.; D. Michael Underhill, Stephen A. Sola, Morgan, Lewis & Bockius, Washington, D.C., of counsel), for Plaintiff-Appellee.

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LUMBARD, *Circuit Judge:*

The Long Island Typographical Union No. 915 (the "Union") appeals from an order of the District Court for the Eastern District of New York, I. Leo Glasser, *Judge*, which granted plaintiff-appellee Newsday, Inc.'s motion for summary judgment in Newsday's action to vacate a labor arbitrator's award. The challenged award ordered reinstatement of William Waters, whom Newsday had discharged for sexually harassing female co-workers.

We conclude that Judge Glasser properly vacated the arbitrator's award as violating the explicit, well-defined, and dominant public policy against sexual harassment in the work place.

I.

On or about September 27, 1989, Newsday commenced this action against the Union to vacate an award issued by labor arbitrator Richard Adelman on August 25, 1989. The arbitration had resolved a dispute between Newsday and the Union under their collective bargaining agreement; the award ordered the reinstatement of William Waters, who had been discharged by Newsday for sexually harassing female co-workers. The Adelman order reinstated Waters to his former position as a compositor, subject to a determination that Waters was medically fit to perform his duties.

Newsday sought vacatur of this award on three grounds: the award offended the well-defined public policy against sexual harassment in the work place; it exceeded the limits of the arbitrator's authority; and it failed to draw its essence from the parties' collective bargaining agreement.

The Union's Answer and Counterclaim opposed Newsday's attempt to vacate the award and requested a order vacating that portion of Arbitrator Adelman's award which made Waters' reinstatement contingent upon his passing a medical examination.

Newsday then moved for summary judgment. Thereafter, the Union cross-moved for summary judgment, seeking to confirm the award of reinstatement and to vacate portions of the award that permitted Newsday to condition Waters' reinstatement on a determination of medical fitness.

In an order dated February 6, 1990, Judge Glasser granted Newsday's motion and denied the Union's cross-motion. The Union appeals. We affirm.

II.

A. *Events Leading to the Adelman Arbitration*

Although it was Waters' sexual harassment of a female co-worker in July 1988 that catalyzed this lawsuit, the dispute between Newsday and Waters began on June 21, 1983, when Waters, a compositor at Newsday's Melville, New York facility since 1968, was discharged for "disorderly conduct" in violation of Composing Room Office Rules. On June 25, Newsday voluntarily reinstated Waters, but Waters and the Union filled a grievance against Newsday for the suspension. The issue was arbitrated before George F. Sabatella in November 1983.

On February 23, 1984, Arbitrator Sabatella issued an award sustaining the disciplinary action as not being in violation of the

parties' collective bargaining agreement. In his decision, Sabatella stated:

> certain female employees also working in the composing room have complained to Newsday management about Mr. Waters (sic) behavior. It appears that when Mr. Waters was occasioned to pass by these female employees certain "offensive and unauthorized contact" took place.

Although Sabatella determined that the award was non-precedent setting,[1] he stated:

> Furthermore, I am also of the opinion the type and degree of misconduct which was the basis of Mr. Waters; disciplinary action can not in any way be tolerated in the work place for it disrupts and demoralizes the people functioning of (sic) a unit. Any action on the part of Mr. Waters which is consistent with this past citable behavior shall be grounds for immediate discharge and he will not be given the benefit of the doubt or shown any leinency (sic).

Waters was again discharged for disorderly conduct on July 22, 1988. The dispute over whether the discharge was for just cause was submitted to Arbitrator Richard Adelman who, in an opinion and award dated August 25, 1989, made factual findings that included the following: Late in the evening on July 7, 1988, Waters "brushed up against (a female co-worker's) lower back and upper buttocks," and then, ten minutes later, "slammed into her back" and "said, 'Excuse me!' in a tone that made (the co-worker) feel the contact was not accidental." The co-worker reported the incident to the Union and to

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[1] Sabatella's decision to issue a non-precedent setting award as between the Union and Newsday was in part due to the parties' collective bargaining agreement, which Sabatella found did not speak to the type of disciplinary action taken by Newsday in Waters' case.

Newsday. Newsday conducted an investigation of this complaint, which revealed two other incidents of alleged sexual harassment.

As described by Arbitrator Adelman, Waters approached a woman in the composing room in late 1983 or early 1984, "put his hand on her rib cage and starting moving it down towards her waist." The woman "grabbed Mr. Waters' hand and told him she would break his fingers if he ever did that again." Because the woman was a probationary employee at the time, she did not report the incident.

Another instance of harassment had occurred in the composing room in December 1986, when Waters "came behind (a female co-worker) and slapped her on the rear end." Several supervisors witnessed the incident, but the worker refused to report it because she was new in the composing room. In light of these incidents and Sabatella's warning in 1984, Newsday discharged Waters on July 22, 1988.

B. *The Adelman Arbitration*

In his opinion, Adelman rejected the Union's position that the three incidents never occurred, and found that they all happened as described in the testimony of Waters' co-workers. Adelman stated:

> (T)here is no doubt that the actions by Mr. Waters in moving his hand down (one co-worker's) back from her rib cage to her waist, in slapping, or patting, (another co-worker) on her rear end, and in slamming into (a third's) back was conduct that violated both the composing room office rules and Newsday's policy against "harassing, abusive or intimidating" behavior. This conduct was quite offensive to the women involved, and clearly constitutes harassment under Newsday's policy, as well as interference with "the business of the office" under the rules of the composing room.

With regard to the appropriate penalty, Adelman rejected the Union's contentions that the incidents involving Waters were minor in nature, and that Newsday used the incidents as a pretext for discharging an employee with a job guarantee. Adelman added that the incidents were serious, and of the type which Newsday has properly attempted to eliminate from its work place.

Nonetheless, Adelman decided that Waters was not discharged for just cause. Although Adelman found "(t)he fact that Mr. Waters has engaged in similar conduct in the past for which he was disciplined is significant, especially considering the serious nature of his conduct," he added, "these offenses are not ones that call for immediate discharge; instead, such offenses call for the application of progressive discipline." Adelman acknowledged that Waters had been subject to discipline in 1983; he state that if Waters had been disciplined after either of the two previously-unreported incidents, then discharge might have been appropriate following the 1988 incident. He concluded that it would be inappropriate and contrary to the concept of progressive discipline to uphold Waters' discharge. He stated:

> At this point, Mr. Waters must understand that he has engaged in conduct that is unacceptable in the workplace, that he is treading on dangerously thin ice, and that any similar offensive behavior shall be grounds for his immediate discharge.

Adelman ruled that Waters, upon passing a medical examination, should be reinstated without back pay.

C. *The District Court Decision*

Judge Glasser vacated Adelman's award of reinstatement, finding that it offended an explicit public policy condemning sexual harassment in the work place "that is clearly defined and readily found in statutes, regulations and judicial decisions." Specifically, Judge Glasser cited Title VII of the Civil Rights Act of 1964, 42

U.S.C.A. § 2000e-2(a)(1) (1981); federal regulations, 29 C.F.R. § 1604.11(c), (d), and (f) (1989); and New York State statutes and regulations. He also stated, "The need to demonstrate judicial cognizance of the public policy against sexual harassment should not require citation beyond *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986)."

Judge Glasser further ruled that the inevitable consequence of the arbitrator's award reinstating Waters would be to "compel his female co-workers to submit to his sexual harassment (conduct of which he has been repeatedly adjudicated) as a condition of their employment" and would "permit his sexual harassment to threaten to perpetuate a hostile, intimidating and offensive work environment." The court also recognized that the EEOC regulations direct an employer to take all steps necessary to prevent sexual harassment, and that Newsday had attempted to comply with that direction.

Judge Glasser opined:

> A clearer expression of a well defined public policy....will not be more readily found. That policy is subverted when an employer is required to reinstate an employee who is a chronic sexual harasser and an award which has that effect should be vacated.

Accordingly, Judge Glasser granted Newsday's motion for summary judgment, vacating the Adelman Award, and denied defendant's cross-motion.

III.

A. *Review of the Arbitrator's Award*

As acknowledged by Judge Glasser, courts have a limited role when asked to review the decision of an arbitrator. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). Courts are not authorized to reconsider the merits of an award, as doing so would undermine the federal policy of settling labor disputes by arbitration. *Id.*

Nevertheless, a court may refuse to enforce an arbitrator's award under a collective bargaining agreement if the award is contrary to public policy. *Id.* at 42. This is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. *Id.* However,

> (A) court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interest.'"

Id. at 43 (emphasis in original) (quoting *W.R. Grace & Co. v. International Union of Rubber Workers, Local 759*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945))).

B. *The Public Policy Against Sexual Harassment*

1. *Federal Statutes and Regulations*

The public policy against sexual harassment in the work place is well-recognized. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex. 42 U.S.C.A. § 2000e-(a)(1) (1981). The Equal Employment Opportunity Commission, (the "EEOC"), which administers and enforces this provision, has promulgated a guideline stating:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when....(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or

> creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1989) (footnote omitted). In its Compliance Manual, the EEOC also has issued the following policy statement:

> (U)nwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.

EEOC Policy Guidance: Sexual Harasment, N-915.035, *reprinted in* EEOC Compl. Man. (BNA) N:4001, 4016 (Oct.25, 1988).[2]

Moreover, Title VII places upon an employer the responsibility to maintain a work place environment free of sexual harassment. The EEOC Guidelines make employers liable for sexual harassment between fellow employees of which it knew or should have known, "unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). The EEOC Guidelines indicate that employers should take all reasonable steps to prevent harassment from occurring in the employment setting, such as

> affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their rights to raise and how to raise the issue of harassment under Title VII, and developing methods to senitize all concerned.

29 C.F.R. § 1604.11(f). The EEOC Compliance Manual further provides that employers should create a procedure for resolving

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[2] New York has similar legislation and rules. *See* N.Y. Exec. Law § 291 (McKinney 1982); New York State Division of Human Rights, *New York: Rulings on Pre-Employment Inquiries*, 8B State Fair Empl. Prac. Man. (BNA) 455:3151, 3159 (1989).

sexual harassment complaints that encourages victims of sexual harassment to come forward. *EEOC Policy Guidance, supra,* at N:4028. "It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation." *Id.*

2. *Case Law*

The public policy against sexual harassment in the work place similarly has been recognized by the courts. In *Meritor Savings Bank, FSB v. Vinson,* the United States Supreme Court held that a plaintiff may establish a Title VII violation by proving that discrimination based on sex has created hostile or abusive work environment. 477 U.S. 57, 66 (1986).[1] In so finding, the Court stated that the EEOC Guidelines, as an administrative interpretation of Title VII, "while not controlling....constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 65 (citations omitted). The Court Also stated that the EEOC Guidelines "drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65.

In sum, there is an explicit, well-defined, and dominant public policy against sexual harassment in the work place.

C. *Arbitrator Adelman's Award*

Adelman's award of reinstatement completely disregarded the public policy against sexual harassment in the work place. The arbitrator has also disregarded Sabetella's ruling that any further acts of harassment by Waters would be grounds for discharge. Instead,

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[1] Environmental work place harassment is harassment that is not directly linked to the grant or denial of an economic *quid pro quo*. *See Meritor Savings Bank, FSB*, 477 U.S. at 65. It is the type of harassment that occurred in the instant case.

Adelman's award condones Waters' latest misconduct; it tends to perpetuate a hostile, intimidating and offensive work environment. Waters has ignored repeated warnings. Above all, the award prevents Newsday from carrying out its legal duty to eliminate sexual harassment in the work place.

In view of this conclusion, it is unnecessary to discuss the other points raised by the parties.

IV.

We affirm the district court's order, which granted Newsday's motion for summary judgment in its action to vacate Arbitrator Adelman's award of reinstatement.

(2)

No. 90-1166

Supreme Court, U.S.
FILED
FEB 22 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LONG ISLAND TYPOGRAPHICAL UNION,
No. 915, CWA, AFL-CIO,

Petitioner,

vs.

NEWSDAY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT NEWSDAY, INC. IN OPPOSITION

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February 22, 1991

QUESTIONS PRESENTED

1. Whether a court may refuse to enforce an arbitration award on public policy grounds only when the award itself violated a statute, regulation or other manifestation of positive law, or compels conduct by the employer that would violate such a law?

2. Whether a reviewing court may substitute its judgment for that of an arbitrator in order to increase a penalty meted out to an employee so as to ostensibly provide greater vindication of a public policy?

3. Whether the public policy against sexual harassment in the workplace is so overriding so that reviewing courts may carve an exception to the traditional policy against vacating arbitration awards?

PARTIES TO THE PROCEEDINGS

A. The parties to the proceedings below all appear in the caption to this case.

B. Pursuant to this Court's Rule 29.1, Newsday, Inc. provides the following statement of parent companies and subsidiaries except for wholly-owned subsidiaries:

Newsday, Inc. is a wholly-owned subsidiary of the Times Mirror Corporation. Newsday does not have any non wholly-owned subsidiaries.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90 - 1166

LONG ISLAND TYPOGRAPHICAL UNION,
NO. 915, CWA, AFL-CIO,

Petitioner,

v.

NEWSDAY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit

BRIEF FOR RESPONDENT NEWSDAY, INC. IN OPPOSITION

Respondent Newsday, Inc. ("Newsday") respectfully requests that the Petition for a Writ of Certiorari of Petitioner Long Island Typographical Union, Local No. 915, CWA, AFL-CIO,

("the Union") to review the judgment of the United States Court of Appeals for the Second Circuit be denied.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 915 F.2d 840. The opinion of the District Court, which is reprinted in the Petitioner's Appendix, is not reported.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 5, 1990. This Court received Petitioner's original Petition for a Writ of Certiorari on January 3, 1991. By letter dated January 4, 1991, the Clerk of the Court

notified Petitioner that its Petition failed to comply with Rules 29.1 and 33.2(7) of the Rules of the Supreme Court. The Clerk's letter directed Petitioner to conform its Petition to the requirements of the Court's Rules and informed the Petitioner that the Court was retaining one copy of the original Petition. Respondent received Petitioner's amended Petition on January 25, 1991.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, the Equal Employment Opportunity Commission Guidelines On Discrimination Because of

Sex, 29 C.F.R. Part 1604 and Section 291 of the New York Executive Law are set forth in the Appendix hereto.

STATEMENT OF THE CASE

A. Statement Of The Facts

This action arises out of Newsday's decision in July 1988 to terminate the employment of William Waters, a Compositor in Newsday's Composing Room, after he engaged in repeated instances of sexual harassment of female co-workers. Newsday's decision came at the end of a five-year period during which Mr. Waters committed multiple instances of highly offensive physical contact against female co-workers. Prior to his termination, Mr. Waters had been suspended for engaging

in the same physical abuse of female co-workers and had received an arbitrator's final warning that any repeat of this misconduct would result in discharge.

Newsday first disciplined Mr. Waters for sexual harassment in 1983 after it received complaints from female workers in the Composing Room about inappropriate and offensive physical touching by Mr. Waters. 915 F.2d at 842. Based upon these complaints, Newsday terminated Mr. Waters on June 21, 1983 for "disorderly conduct" in violation of the Composing Room Office Rules. Id. Although Newsday voluntarily reinstated Mr. Waters four days later, the Union nonetheless grieved this form of suspension under the collective bargaining agreement between Newsday and the Union.

In February 1984, Arbitrator George F. Sabatella issued an award sustaining the company's discipline of Waters after finding that "when Mr. Waters was occasioned to pass by [the complaining] female employees certain 'offensive and unauthorized contact' took place." Id. Arbitrator Sabatella also issued a clear and unmistakable warning that such conduct would not be tolerated in the future.

> Furthermore, I am also of the opinion the type and degree of misconduct which was the basis of Mr. Waters' disciplinary action can not in any way be tolerated in the workplace for it disrupts and demoralizes the people functioning of [sic] a unit. Any action on the part of Mr. Waters which is consistent with this past citable behavior shall be grounds for immediate discharge and he will not be given the benefit of the doubt or shown any leniency [sic].

Id.

Notwithstanding this warning, Waters continued to engage in the same

kind of sexual harassment of his co-workers. In July 1988, a female employee complained to both Newsday and the Union that, late in the evening of July 7, 1988, Mr. Waters had brushed up against her lower back and upper buttocks. Id. She also complained that, approximately 10 minutes after brushing up against her, Mr. Waters slammed into her back and said "Excuse me!" in a tone that led her to believe that he had intentionally run into her. Id. Upon receiving this complaint, Newsday undertook a full investigation of the incident.

During its investigation, Newsday discovered that, since his 1983 termination, Waters had made offensive physical contact with at least two other female employees in the Composing Room. In late 1983 or early 1984, Waters

approached a probationary employee from behind and "put his hand on her rib cage and started moving it down towards her waist." Id. The offensive contact stopped only after the employee "grabbed Mr. Waters' hand and told him she would break his fingers if he ever did that again." Id. In December 1986 Waters approached another female co-worker from behind and "slapped her on the rear end." Id.

After the investigation, the company terminated Waters' employment, again for engaging in multiple acts of sexual harassment against female co-workers. The Union then filed a grievance claiming that just cause did not exist to terminate Waters' employment. Thereafter, the matter proceeded to arbitration before Arbitrator Richard Adelman.

In his award dated July 25, 1989, Arbitrator Adelman expressly found that Waters sexually harassed female co-workers and that the incidents were highly offensive to his co-workers. Rejecting the Union's position that the incidents never happened, Arbitrator Adelman's factual findings specifically provided:

> [T]here is no doubt that the actions by Mr. Waters in moving his hand down [one co-worker's] back from her rib cage to her waist, in slapping, or patting, [another co-worker] on her rear end, and in slamming into [a third's] back was conduct that violated both the composing room office rules and Newsday's policy against "harassing, abusive or intimidating" behavior. This conduct was quite offensive to the women involved, and clearly constitutes harassment under Newsday's policy, as well as interference with "the business of the office" under the rules of the composing room.

915 F.2d at 843

Arbitrator Adelman also rejected contentions by the Union that the incidents were "minor in nature" and that Newsday used the incident as a pretext to discharge an employee with a job guarantee. (Pet. App. at A-3).[1/] He found that Newsday's decision to terminate Mr. Waters "surely was not pretextual, nor was it the result of an overreaction to the clear facts uncovered by Newsday's investigation." Id.

Notwithstanding these findings, Arbitrator Adelman reversed Waters' discharge. Despite finding it significant that Waters had been disciplined for similar misconduct and acknowledging the unmistakable warning given to Waters by Arbitrator Sabatella in 1984,

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1/ "Pet. App." refers to the Appendix to the Union's Petition for a Writ of Certiorari.

the award stated that Waters should be subject to progressive discipline. 915 F.2d at 843. As such, the award stated that Waters should be reinstated without back pay. Id. The award also imposed the condition that Newsday had the right to have Waters examined to determine whether he was medically fit to perform his job. Id.

B. The Proceedings Below

On September 27, 1989, Newsday commenced this action in the United States District Court for the Eastern District of New York to vacate Arbitrator Adelman's award under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. On November 20, 1989, Newsday filed a motion for summary judgment seeking judgment on the

ground, among others, that the arbitrator's award violated the well-defined public policy against sexual harassment in the workplace.

By Order dated February 6, 1990, the District Court granted Newsday's motion. After reviewing the governing law on sexual harassment the District Court concluded that " [a] clearer expression of a well-defined public policy . . . will not be more readily found." (Pet. App. at A-7). The District Court then held that Arbitrator Adelman's award violated that well-defined and dominant policy against sexual harassment in the workplace. The District Court stated in its opinion that the "inevitable consequence" of reinstating Waters would be to "compel his female co-workers to submit to [Waters'] sexual harassment

. . . as a condition of their employment and to permit his sexual harassment to threaten to perpetuate a hostile, intimidating and offensive work environment." (Pet. App. at A-6). The District Court also concluded that the public policy against sexual harassment is "subverted when an employer is required to reinstate an employee who is a chronic sexual harasser . . . ." (Pet. App. at A-7).

The Second Circuit affirmed the District Court's judgment. In analyzing the issues raised on appeal, the Court applied the two-part test set forth in United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987). First, the Court examined statutes, regulations and judicial precedents to determine whether there existed a well-defined and dominant

public policy against sexual harassment in the workplace. Second, the Court addressed whether the arbitrator's award violated that public policy. The Court answered both questions affirmatively.

In its opinion, the Court of Appeals engaged in an extensive analysis of employees' rights under federal and New York law to be free from sexual harassment in the workplace and the corresponding duties of employers to take effective actions to protect those rights. Among other sources of public policy, the Court relied upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e to 2000e-17, the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604, § 291 of the New York Executive Law, and

this Court's decision in Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

After examining the public policy set forth in these sources, the Second Circuit concluded that the District Court properly vacated the arbitration award on the ground that it violated public policy. In reaching its conclusion, the Second Circuit determined that the award had improperly disregarded the public policy against sexual harassment and the fact that a prior Arbitrator had stated that any further acts of harassment would be grounds for immediate discharge. 915 F.2d at 845. The Court also determined that the award tended "to perpetuate a hostile, intimidating and offensive work environment." Id. "Above all," the Court concluded, "the award prevents Newsday

from carrying out its legal duty to eliminate sexual harassment in the workplace." Id.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision in this matter is correct, and further review is not warranted. The Court of Appeals' decision does not present an important question of federal law yet to be decided by this Court, nor does it conflict with any decision of this Court or with opinions of the lower federal courts. The Court of Appeals' decision merely presents a fact-specific application of principles firmly established by this Court.

The Court of Appeals' decision, moreover, does not raise any of the questions presented in the petition for

review. The Court of Appeals did not address, much less decide, Petitioner's issue of whether an arbitration award could be overturned on public policy grounds only if the award violated a statute, regulation or other manifestation of positive law, or compelled employer conduct that violated the law. The Court had no reason to address this question because it held that the reinstatement of plaintiff would conflict with Newsday's legal duty to eliminate sexual harassment from the workplace. Thus, this is not a case where an award was overturned based upon a conflict with public policy that did not involve a violation of positive law. At most, the Union's Petition is challenging the Court of Appeals' application of settled legal principles to the undisputed

facts of this case. This issue does not warrant grant of the Petition.

The remaining questions Petitioner attempts to raise are simply argumentative characterizations of the Court of Appeals' decision as opposed to legitimate questions presented for review by this Court. The Court of Appeals' decision did not purport to provide a "greater vindication" of public policy by substituting its judgment for that of the Arbitrator as to the appropriateness of the punishment meted out to Mr. Waters. Nor did the Court of Appeals' decision purport to create special rules under which arbitrators' awards are examined in sexual harassment cases. The Court of Appeals only examined the arbitration award under the particular requirements of the public policy against sexual

harassment and concluded that it conflicted with those requirements.

A. The Court Of Appeals' Decision Is Correct And Does Not Raise Unsettled Issues Of Federal Law That Require Review By This Court.

The sole issue raised by the Court of Appeals' decision in this matter is whether the Court of Appeals correctly held that, in the factual context of this case, the arbitrator's award directing reinstatement violated the public policy against sexual harassment. This holding does not raise any unsettled issues of law. This Court has recently reaffirmed that the courts have the power to vacate an arbitrator's award that violates well-defined and dominant public policy. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. at 42-43; W. R. Grace &

Co. v. International Union of United Rubber Workers, Local 759, 461 U.S. 757, 766 (1983). It is equally well settled that there is a well-defined and dominant public policy granting employees the right to work in an environment free of sexual harassment which places a corresponding duty upon employers to eliminate sexual harassment from the workplace. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. at 64-73; 29 C.F.R. § 1604.11(a), (d)-(f). Thus, the Court of Appeals' decision constitutes the fact-specific application of settled law. It does not raise any important legal issues for the Court's review.

The Union nonetheless contends that review of the Court of Appeals' decision is warranted to address a question this Court left undecided in

United Paperworkers v. Misco, Inc., 484 U.S. at 45 n.12. This question is whether "a court may refuse to enforce an award on public policy grounds only when the [arbitrator's] award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." Id. According to the Union, this issue is ripe for review, on the one hand, because this Court and others have declined to address this issue and, on the other hand, because an alleged conflict exists among the circuits. These conclusory and contradictory arguments, however, are simply a strained attempt to obtain review of the Court of Appeals' decision based upon an issue that was not addressed, much less decided, in that decision.

As the Union concedes in its Petition, the Court of Appeals' decision did not reach this issue that it now raises for review before this Court. (Petition at 6). Rather, the Court of Appeals' decision held that the arbitrator's award must be vacated on the ground, among others, that the award prevented Newsday from fulfilling its duty under Title VII to eliminate sexual harassment from the workplace. This holding that the award violated positive law made it unnecessary for the Court of Appeals to address or decide whether an arbitrator's award could be overturned based upon a violation of public policy that did not expressly conflict with statutory obligations or other manifestations of positive law.

By focusing on issues not raised by the Court of Appeals' decision, the Union's Petition fails to acknowledge the premise for that decision. The holding of the Court of Appeals is rooted in its determination that the arbitrator's award did conflict with the proscriptions contained in both federal and state laws against sexual harassment. The Union's Petition, however, ignores the statutes, regulations and cases that address the issue of sexual harassment in the workplace. Thus, while the Union attacks the Court of Appeals' decision as a radical departure from judicial precedents, its Petition is devoid of any legal argument challenging the cornerstone of the Court of Appeals' conclusion that the award violated public policy.

An examination of the governing legal principles, moreover, demonstrates that the Court of Appeals' decision is in line with settled law. Petitioner does not dispute the proposition that employees have a federally protected right to work in an environment free of sexual harassment. In Meritor Sav. Bank v. Vinson, 477 U.S. at 66-67, this Court held that discrimination based on sex which creates a hostile or abusive working environment constitutes a violation of Title VII.

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Vinson, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

In reaching its holding in Vinson, this Court approved the EEOC's definition of sexual harassment in its Guidelines on Discrimination Because of Sex. The EEOC's Guidelines provide in relevant part:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (footnote omitted). In this regard, the EEOC has concluded that unwelcome physical contact is a particularly egregious form of sexual harassment. "More so than

in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment." EEOC Policy Guidance: Sexual Harassment, N-915.050, reprinted in EEOC Comp. Man. (BNA) N:4031, 4047 (March 19, 1990).

It is also firmly established that the rights of employees to a work environment free from sexual harassment places corresponding duties upon their employers. An employer may be held liable under Title VII for the sexual harassment of an employee by a co-worker when it knows or should have known of the harassment and fails to take "immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). Thus, discipline that is not reasonably calculated to stop the harassment and provide a non-hostile environment

conflicts with an employer's obligations under Title VII. Ellison v. Brady, No. 89-15428, slip op. (9th Cir. Jan. 23, 1991) (Available on Westlaw, 1991 WL 4579). See also Brooms v. Regal Tube Co., 881 F.2d 412, 421 (7th Cir. 1989) ("An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case . . . .")

An employer's obligation to provide a non-hostile environment, moreover, may require that the harasser be removed from the workplace. As the Ninth Circuit recently explained:

> [I]n some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment. To avoid liability under Title VII for failing to remedy a hostile environment, employers may even have

> to remove employees from the workplace if their mere presence would render the working environment hostile.

Ellison, 1991 WL 4579 at 10 (citation and footnote omitted). Simply stated, when an employee's mere presence creates a hostile environment, an employer cannot remedy the hostile environment except by removing the employee. Id. at 15 n. 19.

Applying this basic legal framework, the Second Circuit made the correct conclusion based upon the undisputed facts of this case that the arbitration award placing Waters back in the workplace violated the well-defined and dominant public policy against sexual harassment. Newsday was not faced with an employee who committed an isolated instance of sexual harassment that blemished an otherwise spotless record. Mr. Waters had engaged in

multiple instances of highly offensive physical abuse of female employees. Mr. Waters had also demonstrated that he was not amenable to discipline on this issue. He continued to engage in highly offensive sexual harassment notwithstanding the fact that he had received a clear warning that such continued misconduct would result in dismissal and that he would be shown no leniency or given the benefit of any doubt. Under such circumstances, the apprehension Mr. Water's mere presence in the workplace caused Newsday's female employees could not be relieved by additional punishment or by management preventive measures. The only way Newsday could assure female employees their right to work in a non-intimidating environment was to remove Mr. Waters from the workplace.

By ordering Mr. Waters' reinstatement despite his previous punishment and issuing a new warning that he would be terminated if he engaged in similar misconduct in the future, the Adelman arbitration award had the effect of recreating the hostile environment that existed prior to Mr. Waters' termination. Title VII, however, not only granted Mr. Waters' female co-workers the right not to be physically abused but also the right to work in an environment free of the well-founded fear of such abuse. Like their male counterparts, Mr. Waters' female co-workers have the right to work without having to be apprehensive or alarmed every time they are in Mr. Waters' presence.

B. The Court of Appeals' Decision Did Not Purport To Increase The Severity Of The Punishment To Provide A "Greater Vindication" Of Public Policy And Did Not Create An Exception For Arbitration Awards Involving Sexual Harassers

The Union's Petition also contends that review of the Court of Appeals' decision is warranted because the decision departed from the accepted and usual course of proceedings, and sanctioned such a departure by the District Court. The Union submits two arguments in support of this contention. First, the Union argues that, in order to provide a "greater vindication" of public policy, the Court of Appeals incorrectly substituted its judgment for that of the Arbitrator as to the appropriateness of the punishment meted out to Mr. Waters. Second, the Union argues that the Second Circuit established an across-the-board rule requiring that

employees accused of sexual harassment be dismissed. Neither argument finds any basis in the Second Circuit's opinion.

The Union's argument that the Court of Appeals sought to substitute its judgment for that of the Arbitrator mischaracterizes the Court's holding. The issue addressed by the Court did not involve a contractual determination of whether Waters was punished too severely or not severely enough for his continued sexual harassment of his female co-workers. Rather, it involved a fact-driven determination of whether placing Waters back into his former position violated the public policy against sexual harassment. The Court of Appeals concluded that Newsday's obligations under Title VII to provide its employees with a non-hostile

environment required it to remove Mr. Waters from the workplace when he continued to harass female employees in the face of prior discipline and a prior categorical warning. The Court of Appeals did not substitute itself as interpreter of the contract but rather confined its role to the determination of whether the award violated the well-defined and dominant public policy against sexual harassment.

Contrary to the Union's assertion, moreover, the Court of Appeals' opinion does not even remotely suggest an across-the-board rule mandating that grievants "accused" of sexual harassment be discharged. Nor does the opinion suggest that such persons have a more onerous burden in avoiding discharge than those persons accused of other forms of misconduct. This case

stands on its own facts involving an employee found by the Arbitrator to have an extensive record of physical abuse that continued unabated in the face of an unmistakable warning that he would be discharged if he continued to engage in his highly offensive harassment of female employees. Obviously, other cases will involve situations where the employer's obligations to abate the hostile environment will not require the employee's removal from the workplace. But these situations were not before the Court of Appeals and are properly not addressed in its decision.

Equally without merit is the Union's contention that the Court of Appeals' decision "carves out" a special exception for an arbitrator's award involving discipline for sexual

harassment.[2/] There is absolutely nothing in the opinion that in any way justifies such a contention. The Court of Appeals' decision involved a straightforward application of the two-part analysis set forth in Misco to the particular facts of this case without "carving out" any special exception for sexual harassment cases. To be sure, the requirements of particular public policies differ from statute to statute but there is nothing in the Court of Appeals' opinion that suggests a deviation from the basic analytical

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2/ The Union states in its Petition the third question presented is "[w]hether the public policy against sexual harassment in the workplace is so overriding so that reviewing courts may carve an exception to the traditional policy against vacating arbitration awards?" As noted above, there is nothing in the Court of Appeals decision that justifies this argumentative characterization of its holding. There is also no argument in the Union's Petition that addresses this question which the Union claims is presented to this Court.

framework for review of arbitrators' awards.

Furthermore, the cases discussed at the close of the Union's Petition provide no support for its argument that the Court of Appeals' decision constitutes a departure from settled law. Apart from the fact that the decisions are of limited relevance because they do not involve the statutory proscriptions against sexual harassment, none of the decisions involved a statutory requirement that an employer take prompt and effective action to remedy a condition caused by an employee. Rather, they all involved circumstances under which the courts quite properly refused to vacate awards based upon vague, generalized assertions of public policy.

For example, in Kane Gas Light and Heating Co. v. International Bhd. of Fireman and Oiler, Local 112, 687 F.2d 673 (3d Cir. 1982), cert. denied, 460 U.S. 1011 (1983), the Third Circuit declined to vacate an arbitrator's award because there was no public policy that prohibited the reinstatement of a gas company employee who turned off the company's gas supply to its customers. Similarly, in Amalgamated Transit Union v. Aztec Bus Lines, 654 F.2d 642 (9th Cir. 1981), the Ninth Circuit declined to vacate an arbitration award of reinstatement because the employer could not point to any legal requirement that it terminate a bus driver who had exhibited poor judgment. Likewise, in Local 453 v. Otis Elevator Co., 314 F.2d 25 (2d Cir.), cert. denied, 373 U.S. 949

(1963) and International Ass'n of Machinists v. Campbell Soup Co., 406 F.2d 1223 (7th Cir.), cert. denied, 396 U.S. 820 (1969), the courts declined to vacate awards reinstating employees convicted of engaging in gambling activities on company premises because there were no legal requirements proscribing the employment of such individuals.[3/]

In contrast to the above cases, Arbitrator Adelman's award does conflict with a well-defined statutory

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3/ The district court decisions cited by the Union are similarly distinguishable. See Premium Bldg. Prods. Co. v. United Steelworkers of America, 616 F. Supp. 512 (N.D. Ohio 1985) (reinstatement of employee caught smoking marijuana on company premises), aff'd without op., 798 F.2d 1415 (6th Cir. 1986); Service Employees International Union, Local 722 v. Children's Hosp. Nat'l Medical Center, 640 F. Supp. 272 (D.D.C. 1984) (reinstatement of nurse fired after scolding and laying hands on young patient). Neither case involved a legal requirement mandating that an employer take action to remedy a condition caused by an employee's misconduct.

obligation on the part of an employer. The Court of Appeals based its holding on the determination that the award conflicted with Newsday's duty to take effective action in order to ensure equality of working conditions for its employees. This duty rests upon statutory dictates under federal and state law, not upon generalized notions of the public interest. As such, the Court of Appeals correctly concluded that public policy required that the arbitration award be vacated.

CONCLUSION

For the foregoing reasons, Respondent Newsday, Inc. respectfully requests that the Union's Petition for a Writ of Certiorari to the United States Court of Appeals be denied.

Dated: New York, New York
February 22, 1991

Respectfully submitted,

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APPENDIX

1. Section 301 of the Labor-Management Relations Act provides in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

2. Title VII of the Civil Rights Act of 1964 provides in relevant part:

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ....

42 U.S.C. § 2000e-2(a)(1).

3. Section 291 of the New York Executive Law provides in relevant part:

> 1. The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sex or marital status is hereby recognized as and declared to be a civil right.

New York Exec. Law § 291.1

4. The Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex provide in relevant part:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's

work performance or creating an intimidating, hostile, or offensive working environment.

* * *

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing

> appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(a),(d)-(f) (footnote omitted).